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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1366 124

MARGARET M. JOHNSON AND MARY E. LAYTON, DOING BUSINESS AS UNITED STATES DENTAL COMPANY, AND VOYLE CLARK JOHNSON,
Petitioners,

VS.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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IN THE

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No.

MARGARET M. JOHNSON AND MARY E. LAYTON, DOING BUSINESS AS UNITED STATES DENTAL COMPANY, AND VOYLE CLARK JOHNSON,
Petitioners,

VS.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, Margaret M. Johnson, Mary E. Layton, and Voyle Clark Johnson, respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit rendered on April 27, 1945, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, finding petitioners guilty of alleged violations of the Federal Denture Act of 1942 (56 Stat. 1087; 18 U.S.C., Sec. 420 (f)(g). Supplement 1943),

and sentencing them to pay a fine of One Thousand Dollars ($1,000) each. The opinion of the Circuit Court of Appeals appears in the record at page 39 thereof.

Petition for rehearing, which appears in the record on page 43 thereof, was denied by the Court on May 11, 1945.

1. Jurisdiction.

a. Federal jurisdiction of the Court below arose upon an indictment in the United States District Court for the Northern District of Illinois under the Federal Denture Act, U. S. Code, Title 18, Sec. 420(f).

b. The jurisdiction of the Supreme Court to review on Writ of Certiorari is invoked under Section 240 of the Judicial Act, as amended by act of February 13, 1925, 43 Stat. 938; USCA, Title 28, Sec. 347(a).

c. This Court has never passed upon the constitutionality of the substantive provisions of the Federal Denture Act nor upon the constitutionality of the dentistry laws of Indiana, Michigan, and Wisconsin as applied to a dental laboratory constructing dentures from self-taken impressions.

2. Summary Statement of the Matters Involved.

The defendants operate the United States Dental Company, which manufactures dentures under the supervision of dentists licensed under Illinois law. Eleven of these dentures were constructed from impressions sent to them by persons in the states of Indiana, Michigan, and Wisconsin who had personally taken these impressions of their own teeth or mouth. After the dentures were completed, defendants mailed them in Illinois to the persons sending the impressions from the states of Indiana, Michigan, and Wisconsin.

Based upon the above facts which were stipulated by defendants (Tr. 19), defendants were indicted (Tr. 2) for alleged violation of the Federal Denture Act of 1942 (56 Stat. 1087; 18 U.S.C., Sec. 420 (f)(g), Supp. 1943). After pleas of not guilty (Tr. 17), the trial court found the defendants guilty and imposed a fine of $1,000 on each of the three defendants (Tr. 23). Upon appeal to the United States Circuit Court of Appeals for the Seventh Circuit, this judgment was affirmed (Tr. 39). The petition for rehearing was denied (Tr. 53).

3. The Statutes Involved.

The indictment was based upon a charge of violating the Federal Denture Act, which reads as follows:

> "It shall be unlawful, in the course of the conduct of a business of constructing or supplying dentures from casts or impressions sent through the mails or in interstate commerce, to use the mails or any instrumentality of interstate commerce for the purpose of sending or bringing into any State or Territory the laws of which prohibit—
>
> "(1) the taking of impressions or casts of the human mouth or teeth by a person not licensed under the laws of such State or Territory to practice dentistry;
>
> "(2) the construction or supply of dentures by a person other than, or without the authorization or prescription of, a person licensed under the laws of such State or Territory to practice dentistry; or,
>
> "(3) the construction or supply of dentures from impressions or casts made by a person not licensed under the laws of such State or Territory to practice dentistry,
>
> any denture constructed from any cast or impression made by any person other than, or without the authorization or prescription of, a person licensed under the laws of the State or Territory into which such denture is sent or brought to practice dentistry."

The government contended that the dentistry laws of Indiana, Michigan, and Wisconsin contain one or more of the prohibitions enumerated as subparagraphs 1, 2, and 3 in the Federal Denture Act quoted above.

Wisconsin Statutes, 1943, Sec. 152.02;
Indiana Statutes (Burns, 1943), Sec. 63-522;
Michigan Public Acts, 1939, No. 122, Sec. 14.629.

4. The Questions Presented.

The questions involved are:

(1) The constitutionality of the dentistry laws of Indiana, Michigan, and Wisconsin.

(a) Whether the dentistry laws of Indiana, Michigan, and Wisconsin which prohibit a dental laboratory from constructing dentures except upon the order or prescription of or upon the receipt of impressions taken by a licensed dentist, violate the Fourteenth Amendment of the United States Constitution when invoked against a dental laboratory manufacturing dentures from impressions submitted by persons taking said impressions of their own mouth or teeth.

(b) Whether these dentistry laws delegate legislative power over dental laboratories to licensed dentists without standards to guide them, in violation of the Fourteenth Amendment of the United States Constitution.

(2) The constitutionality of the Federal Denture Act of 1942 (56 Stat. 1087; 18 U.S.C. Sec. 420 (f). Supp. 1943)

(a) Whether, as the Circuit Court of Appeals assumed without deciding, Congress may constitutionally delegate its legislative power over the construction of dentures to dentists licensed under state law.

(b) Whether the language of the Federal Denture Act is so vague and ambiguous as to render it unconstitutional in failing to apprise those accused of the nature of the acts prohibited as a crime.

5. Reasons Relied Upon for the Allowance of the Writ.

1.

This is a test case to determine the constitutionality of the Federal Denture Act, an issue never before decided by this Court. This Act was passed in 1942 and its validity or unconstitutionality should now be settled by this Court.

2.

The Circuit Court of Appeals has decided an important question of federal law which has not been, but which should be, settled by this Court.

3.

The opinion of the Circuit Court of Appeals is not in accord with applicable decisions of this Court, and particularly the cases of *Schecter* v. *U. S.*, 295 U. S. 445 and *Carter* v. *Carter Coal Co.*, 298 U. S. 238. The Circuit Court of Appeals failed to give consideration to defendants' contention that the Federal Denture Act unconstitutionally delegates legislative authority to private persons, without standards to guide them, and to the further contention that the uncertainty of the criminal act violates the Fifth and Sixth Amendments.

4.

The Circuit Court of Appeals failed to decide the important question raised by defendants as to whether the

dentistry laws of Indiana, Michigan and Wisconsin are unconstitutional under the Fourteenth Amendment of the Federal Constitution, if these statutes are invoked to prohibit defendants from mailing dentures constructed from self-taken impressions.

5.

The opinion of the Circuit Court of Appeals fails to meet the clear constitutional issues raised by defendants and it does not clearly settle the law regarding the validity of shipments of dentures to states other than Indiana, Michigan and Wisconsin.

6.

It is a matter of public importance that the constitutional rights of persons like the defendants be protected against abuse.

For the reasons above outlined, your petitioners pray that a writ of certiorari issue unto the United States Circuit Court of Appeals for the Seventh Circuit to review its decision in this case.

Respectfully submitted,

H. Albert Young,
Albert I. Kegan,
Walter F. Dodd,
Counsel for Petitioners.

John A. Nash,
Voyle Clark Johnson,
Of Counsel.

IN THE

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Petitioners,

VS.

THE UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

1. The Opinions Below.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit is at page 39 of the record. The District Court rendered no opinion but entered an order which is printed in the record at page 23.

2. Jurisdiction.

The petition sets forth, on page 2, the grounds on which jurisdiction is invoked.

3. Statement of the Case.

The petition sets forth an outline of the facts on page 2, under the caption, "Summary Statement of the Matters Involved." The facts are not in issue; only questions of law are involved.

4. Statutes Involved.

The Federal Denture Act (18 U.S.C.A. Sec. 420(f)) is quoted in full on page 3 of the petition. The applicable sections of the dentistry laws of Indiana, Michigan and Wisconsin are cited on page 4 of the petition.

5. Specification of Errors.

(1) The Circuit Court of Appeals for the Seventh Circuit denied the petitioners their constitutional right to engage in the lawful business of constructing dentures from self-taken impressions.

(2) The Circuit Court of Appeals erred in failing to pass upon defendants' contention that the dentistry laws of Indiana, Michigan and Wisconsin contain unconstitutional delegations of legislative authority under the Fourteenth Amendment by conferring upon dentists licensed under state law, without any standards to guide them, the power to legalize the manufacture of a denture, or to make such manufacture criminal.

(3) The Court neglected to consider defendants' contention that the Federal Denture Act, in which Congress delegated its legislative power over the mails and interstate commerce to private individuals without any standards for guidance, is in contravention of Article 1, Section 1 and the Fifth Amendment of the U. S. Constitution.

(4) The decision is in conflict with the principles established by this Court in the cases of *Schechter* v. *U. S.*, 295 U. S. 445 and *Carter* v. *Carter Coal Co.*, 298 U. S. 238, in which it was held that a federal statute is invalid if it attempts to regulate an occupation without specifying reasonable standards for the regulation thereof.

(5) The Court ignored the well recognized rule that a criminal statute must be so definite and clear as to apprise those accused of the nature of the acts prohibited.

ARGUMENT.

The constitutionality of the Federal Denture Act has never been tested before and it is important that this issue should be settled now by this Court. This Act has been before this Court upon the question whether venue under the Act exists in the District in which the denture is delivered through the mails: *U. S.* v. *Johnson et al*, 56 S. Ct. 249 (1944). It was decided there that such District is without venue.

I.

A. Petitioners may constitutionally construct dentures from self-taken impressions.

The Federal Denture Act becomes operative only upon the existence in a state law of the following prohibitions:

> "(1) the taking of impressions or casts of the human mouth or teeth by a person not licensed under the laws of such State or Territory to practice dentistry;

"(2) the construction or supply of dentures by a person other than, or without the authorization or prescription of, a person licensed under the laws of such State or Territory to practice dentistry; or,

"(3) the construction or supply of dentures from impressions or casts made by a person not licensed under the laws of such State or Territory to practice dentistry."

The Circuit Court of Appeals stated the following sections of Indiana, Michigan, and Wisconsin dentistry laws were applicable:

Indiana Statute (Burns 1943) Sec. 63-522;

Michigan Public Acts, 1939, 122, Sec. 14.629;

Wisconsin Statutes, 1943, Sec. 152.02.

These state laws and subparagraph 1 of the Federal Denture Act, if literally construed, would prevent a person not licensed to practice dentistry from taking an impression of his own mouth or teeth. However, the Circuit Court of Appeals conceded for the purposes of the appeal "that no law which prohibits a person's making an impression of his own mouth could be constitutional" (Tr. 40). By interpretation, therefore, that Court excluded self-taken impressions from the purview of the state dentistry laws. Such interpretation was necessary to prevent the laws from being unconstitutional.

Similarly, the provisions of the state laws and subparagraph 2 of the Federal Denture Act concerning the construction of dentures by laymen cannot be literally construed, when self-taken impressions are in issue. The logical application of the Circuit Court's interpretation would permit the construction of dentures by a person other than, or without the authorization or prescription of, a licensed dentist if the dentures are constructed from impressions taken by persons of their own teeth or mouth.

A contrary interpretation denies petitioners their right to engage in a lawful business as guaranteed by the due process clause of the Fourteenth Amendment of the Federal Constitution.

Beaver Brook Resort Co. et al v. *Stevens,* 76 Colo. 131, 230 Pac. 121 (1924);

Meyer v. *Nebraska,* 262 U. S. 390, 399 (1923);

Prata Undertaking v. *State Board of Embalmers and Funeral Directors,* 155 R. I. 454, 182 Atl. 808 (1936);

State Board of Barber Examiners v. *Cloud,* 220 Ind. 552, 44 N.E. (2d) 972 (1942).

The attempted regulation of dental laboratories was passed in response to an economic pressure group, namely an organized body of licensed dentists. It is a well recognized fact that licensed dentists usually do not perform the laboratory work on dentures but send this work to skilled laboratory technicians in dental laboratories such as that operated by the defendants. The laboratory business has always been properly deemed to be outside, and separate from, the profession of dentistry which it serves. In prior years, the dentist was the only person from whom a denture could be procured, and his rates were relatively high for a large block of the people, particularly those living in rural areas. The result was that they either paid those high fees or they went toothless. With the inception of dental laboratories, such as that operated by the defendants, and direct dealings with the public, usually by mail, the public has been given an oportunity to secure dentures directly and at lower costs than had previously been available through the channels of the dentist. With this threat to their exclusive high fees, dentists sought legislation to prevent dental laboratories from dealing with the public. The courts have consistenly invalidated

laws which regulate a business on the pretext of advancing the public welfare, but which in reality advance the interest of a minority group.

State Board of Barber Examiners v. *Cloud,* 200 Ind. 552, 44 N.E. (2d) 972, 978 (1942).

State ex rel Booth v. *Beck Jewelry Enterprise,* 41 N.E. (2d) 622, 141 ALR 876 (Ind. 1942);

State v. *Cromwell,* 306 N. Dak. 356, 9 N.W. (2d) 914, 922 (1943).

B. The dentistry laws of Indiana, Michigan, and Wisconsin unlawfully permit private persons to determine what is a criminal act without any standards for guidance and are violative of the due process clause of the Fourteenth Amendment and the Sixth Amendment of the Federal Constitution.

The legislatures of Indiana, Michigan, and Wisconsin made no attempt to regulate dental laboratories or their work. The dentistry laws excluded from their purview dentures constructed upon the "order" or "prescription" of a licensed dentist. These states have granted the power to any individual licensed dentist to bring within, or to exclude from, the operation of the dentistry laws the work of any dental laboratory. Thus the business of the dental laboratory may be subject to, or be exempt from, the requirements of a dentistry license depending upon the dictates of any dentist. No standards or qualifications are specified in determining whether the work of a particular laboratory should be "prescribed" or not.

Such indefinite delegation of legislative power without standards has been held in many cases to be violative of the Fifth, Sixth, and Fourteenth Amendments:

Hoff v. *State of Delaware,* 39 Del. 134, 197 Atl. 75 (1938);

Seigneous v. *Rice*, 273 N.Y. 44, 6 N.E. (2d) 91 (1936);

Gibson Auto Co. v. *Finnegan*, 217 Wis. 401, 259 N.W. 420 (1935);

Connally v. *General Construction Co.*, 269 U. S. 385 (1926).

The *Van Keegan* case arose under a law prohibiting the sale of eyeglasses except under the supervision of a licensed optician and further provided that optical establishments of licensed opticians may sell glasses upon obtaining a permit from the Commission. The Connecticut court invalidated the statute on the ground that it unconstitutionally delegated legislative power to the Commission. The Court said:

> "Nowhere in the chapter are there any provisions as to the method of conducting the business which would limit the regulations. No sufficient guide for the exercise of the discretion reposed in the Commission has been set up. No standards for issuances of permits have been specified."

Statutes have been held invalid when they confer legislative power, without definite standards for guidance, over an occupation to a board or commission. This invalidity is still more apparent when the legislative power is conferred upon a private individual—the licensed dentist under the state dentistry laws.

II.

A. The Federal Denture Act unlawfully delegates legislative power to private persons.

The Federal Act goes much further than the State Acts of Indiana, Michigan, and Wisconsin. While the State Acts use the words "prescription", "order", or "di-

rections", the Federal statute has substituted the words "authorization or prescription". To "authorize" means "to clothe with authority, warrant or legal power, to give a right to act; to empower". The word "authority" has, among other synonyms, the words "power", "dominion", and "jurisdiction" (Webster's International Dictionary). It is evident, therefore, that regardless of the provisions of the State statutes, under the Federal statute no order, prescription or directions are required, nor need the delivery be to a licensed dentist. All the licensed dentist of one of these states needs to do to legalize the manufacture of dentures to be shipped into his own state is simply to advise the laboratory that it may or is permitted to go ahead with the construction, as this would be giving "the right to act" or "empowering".

The Federal statute here involved recognizes the competence of the laboratory to take the impression and to make and fit the denture, if it obtains the authorization of a dentist. It does not forbid laboratories from taking or receiving impressions. None of the acts are criminal if a dentist authorizes them, even though he in no other way participates either in taking the impression or in making and fitting the denture. The statute recognizes that these acts are not criminal if the dentist, without any degree of supervision on his part, permits their performance by the laboratory. No consideration need be given by the dentist to the method by which the impression was taken, to the question of by whom it was taken, to the standing or competence of the laboratory, or to the manner of manufacture. Indeed, no impression is required at all. The licensed dentist has unbridled discretion in the matter. It is respectfully submitted that this is an attempted delegation of legislative power without standards.

Schechter Poultry Corp. v. *U. S.*, 295 U. S. 495, 97 A.L.R. 947 (1935);

Carter v. *Carter Coal Co.*, 298 U. S. 238 (1935);
U. S. v. *Cohen Grocery Co.*, 255 U. S. 81 (1921).

In the *Schechter* case, Chief Justice Hughes said (pp. 537, 531):

> "Such delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress.
>
> "It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. . . .".

In the case of *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1935), Justice Sutherland said (p. 311):

> "The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form, for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business . . . a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property."
>
> "The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question. *Schechter Corp.* v. *United States*, 295 U. S. at p. 537; *Eubank* v. *Richmond*, 226 U. S. 137, 143; *Seattle Trust Co.* v. *Roberge*, 278 U. S. 116, 121-122."

This attempted delegation of authority to the licensed dentists of the States involves also an unlimited authority over what dentures shall be admitted to the mails or to the

channels of interstate commerce. The fact that the power is indirect, in other words, to be accomplished by refusing to authorize the manufacturer to construct dentures intended for shipment into his State, does not rob it of its significant feature—power in the hands of a private citizen to determine at his own will what shall and what shall not be mailed or shipped in interstate commerce. The law does not profess to provide how the plate shall be manufactured, the qualifications of the technician making it, the nature of the cast or impressions from which it is constructed, or the procedure which shall be followed in obtaining a fit. The sole requirement is that its manufacture must be authorized by a registered dentist of the State into which it is to be sent. A prescription is an alternative but not a requirement; the dentist need send no cast, no measurements, no direction—only an authorization.

The declaration of the Circuit Court of Appeals that the "Federal Government, under its interstate power, may aid such state legislation" and that its action for that purpose "is constitutionally unchallengeable" is unquestionably too broad. The Congress cannot adopt unconsitutional means to accomplish a purpose it deems worthy, otherwise the constitutionality of all federal legislation would be judged not by the statute itself but the purpose thereof, which is, of course, a legal absurdity.

B. The Federal Statute is unconstitutional because of its indefinite, vague and ambiguous nature.

Under the Federal Statute, it is clear that because of the delegation of power it contains, the same act may be legal or illegal depending upon whether it has been authorized or not authorized by a registered dentist who is not restricted by any rule or standard. Moreover, the Federal statute is not co-extensive with the State statutes; it allows

dentures to be made for shipment into States on the mere *authorization* of licensed dentists of such States without regard to State requirements relative to the taking of impressions, delivery to licensed dentists, orders or prescriptions or advertising to the public. The words of the prohibiting clause of the Federal Statute "constructed from any cast or impression made by any person other than, or without the authorization or prescription of, a person licensed under the laws of" are quite ambiguous, since English construction would necessitate the conclusion that the phrase "without the authority or prescription of" related to "impressions"; but it may have been intended, as the Government contends, to relate back to the verb "constructed". Moreover, the applicability of the Federal Statute may depend upon what is covered by the reference in the State laws to the "curricula" of "recognized" schools and colleges, a very indefinite specification for a criminal statute.

This Court has held that "No one may be required at the peril of life, liberty, or property, to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids".

Lanzetta v. *N. J.*, 306 U. S. 451 (1939).

Very recently, the Connecticut Supreme Court in the case of *Connecticut* v. *Van Keegan* (Conn. Supreme Ct., decided April 16, 1945, 13 U. S. Law Week 2567) pointed out that a penal statute may be void for indefinitenes. It said:

> "Reasonable certainty is a prime requisite in a statute and its absence invalidates the statute. The rule is of greater insistence when, as here, a criminal prosecution is involved".

Petitioners submit that a statute imposing criminal penalties should be spelled out in sufficient detail to be clear, forthright, and definite.

CONCLUSION.

The questions presented are thus substantial and of great public importance, in view of the fact that the case is one of first impression under the Federal Denture Act. The Circuit Court of Appeals apparently failed to perceive the importance of the constitutional issues raised and ignored them completely.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 124

MARGARET M. JOHNSON, MARY E. LAYTON, AND VOYLE CLARK JOHNSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 39–41) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered April 27, 1945 (R. 42), and a petition for rehearing (R. 45–51) was denied May 11, 1945 (R. 53). The petition for a writ of certiorari was filed June 11, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of Feb-

ruary 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the Federal Denture Act of 1942 unlawfully delegates legislative power to licensed dentists and whether it is too vague and ambiguous to satisfy constitutional standards.

2. Whether the laws of Indiana, Michigan, and Wisconsin regulating the practice of dentistry are, in so far as they relate to manufacturers of dentures, an invalid exercise of the states' police power.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra*, pp. 11–14.

STATEMENT

This is another aspect of litigation involving petitioners which was before the Court in *United States* v. *Johnson,* 323 U. S. 273, in which the question of venue under the Federal Denture Act was considered. On May 19, 1944, petitioners were indicted (R. 2–14) in the United States District Court for the Northern District of Illinois in eleven counts charging violations of that statute. Count 1 (R. 2–3) charged, in the language of the statute, that petitioners were engaged in the business of constructing and supplying dentures from casts and impressions sent through the mails and that they used the mails on July

29, 1943, for the purpose of sending a set of dentures, not constructed in accordance with the requirements of the Federal Denture Act, from Illinois to Wisconsin, the laws of which proscribe certain practices, recited in the federal statute, in connection with the construction of dentures. The remaining counts contained similar allegations, each specifying a different use of the mails in sending dentures from Illinois into either Wisconsin, Michigan, or Indiana.

It was stipulated (R. 19–22) between the parties that petitioners are engaged in Chicago, Illinois, in the business of constructing and supplying dentures from casts and impressions sent through the mails; that they used the mails for sending dentures to the persons named in the indictment, who resided in Wisconsin, Michigan, and Indiana; that these dentures were constructed from self-impressions made by the persons to whom the dentures were sent, none of whom were licensed dentists; that none of the impressions were made upon the authorization or prescription of a licensed dentist; and that petitioners used the mails in the manner described with full knowledge of the provisions of the Federal Denture Act.

Petitioners waived a jury trial (R. 18) and were convicted on all counts of the indictment. Each petitioner was sentenced generally to pay a fine of $1,000 (R. 23). Upon appeal to the Circuit Court of Appeals for the Seventh Circuit, the judgments were affirmed (R. 42).

ARGUMENT

The Federal Denture Act (*infra,* pp. 11–12), makes it unlawful for persons who, like petitioners, are engaged in the business of constructing or supplying dentures from casts or impressions sent through the mails or in interstate commerce, to use the mails or the facilities of interstate commerce to send into a state a denture constructed from a cast or impression made by a person other than a dentist licensed by the state, unless the denture is constructed pursuant to the "authorization or prescription" of such a dentist. Broadly stated, the statute denies use of the mail or the facilities of interstate commerce for the shipment of dentures which could not lawfully be constructed in the state into which the denture is sent. For example, Section 63–501 of the Indiana Statutes, 1933, interdicts the practice of dentistry by any unlicensed person. And Section 63–522 defines any person practicing dentistry as including any person who "furnishes, supplies, constructs, reproduces, repairs, or adjusts any prosthetic denture * * * and delivers the same to any person other than the duly licensed dentist upon whose prescription or order the work was performed." It is clear from the stipulated facts, and petitioners do not contend to the contrary, that the practice in which they engaged of constructing dentures by mail order would have been unlawful if practiced in Indiana. It is equally

unlawful when practiced interstate by sending dentures from Illinois to Indiana or to any state having similar regulatory laws.

I

(a) Petitioners contend (Pet. 13–16) that the Federal Denture Act unconstitutionally delegates legislative power to licensed dentists in that it permits them to "authorize" the construction of dentures by persons who otherwise would be unable to do so. It is petitioners' view that, giving "authorization" its broadest meaning, a dentist might, without prescribing a denture or exercising any degree of supervision over its construction, undertake generally to authorize denture manufacturers to construct dentures; that, like a licensing agency, he is empowered to grant authority to denture manufacturers to engage in the production of dentures. We think it clear that the Act has no such meaning. Obviously it does not contemplate a general licensing scheme for the construction of dentures, with the licensing power lodged in licensed dentists. Rather, read in the light of the state statutes which it is designed to implement,[1] the Act, it is plain, contemplates that a licensed dentist may order or prescribe a denture for a patient and that the manufacturer may use the mails or facilities of interstate commerce for the purpose of supplying

[1] See Senate Report No. 1779 and House Report No. 1893, 77th Cong., 2d sess.

such denture, much the same as a physician may prescribe a medicant for a patient and a pharmacist may then supply the medicine. In our view the Act presents no question of delegation of legislative power and petitioner's contention is thus without merit.

(b) We likewise perceive no merit in petitioner's contention (Pet. 16–17) that the Act is so vague, indefinite, and ambiguous as to be unconstitutional. While perhaps not a model of draftsmanship, there is little question that its meaning is clear and that petitioners are not in the least required to speculate as to whether their activities are proscribed by the statute. We submit that the constitutional problem which petitioners find in the statute vanishes upon analysis.

Petitioners suggest (Pet. 17) that the words of the prohibiting clause of the federal statute—"any denture constructed from any cast or impression made by any person other than, or without the authorization or prescription of, a person licensed under the laws of the State or Territory into which such denture is sent or brought to practice dentistry"—"are quite ambiguous, since English construction would necessitate the conclusion that the phrase 'without the authority or prescription of' related to 'impressions'; but it may have been intended, as the Government contends, to relate back to the verb 'constructed.'" As petitioners say, we think the phrase "without the authorization or prescription of," appearing after the dis-

junctive "or," clearly refers to "any denture constructed," but, in any event, the mere fact that there may exist in a statute a question of determining whether a phrase modifies one word or another, furnishes no basis for concluding that the statute is too vague and indefinite to meet constitutional requirements. If it did, there would be many statutes on the books which would be open to the same attack. In any event, the question of construction is not presented by this case, for it is clear that the impressions were not taken by licensed dentists and that neither the dentures nor the impressions were authorized or prescribed by such dentists.

Similarly, the fact that some of the state laws defining the practice of dentistry include the provision that the performance of any of the activities included in the curricula of recognized dental schools or colleges is the practice of dentistry (see *infra*, pp. 13–14), does not present any problem of indefiniteness in this case. In the first place, we think the Court may judicially note the fact that the curricula of recognized dental schools include the subject of the construction of dentures and other appliances to be worn as substitutes for natural teeth. Secondly, the question need not be reached in this case, for the general sentences imposed upon petitioners are supported by any of the counts predicated on shipments into Indiana and Wisconsin, the statutes of which expressly

state that the activities of petitioners constitute the practice of dentistry. *Hirabayashi* v. *United States,* 320 U. S. 81, 85, 105, and cases cited.

II

(a) Petitioners also challenge (Pet. 9–12) the constitutionality of the laws of Michigan, Indiana, and Wisconsin which regulate the practice of dentistry in those states. As we understand their argument, it runs as follows: To construe literally the state laws as prohibiting an individual from taking an impression of his own mouth would render them unconstitutional as an invasion of his right of self-medication. Therefore, to avoid a determination that the statutes are unconstitutional, they must be construed as not prohibiting a person from taking an impression of his own mouth. It follows, they argue, that if a person may take an impression of his own mouth, he may engage another to construct a denture for him from that impression and that the state laws which interdict the construction of such dentures are an invalid exercise of the states' police power.

Assuming, *arguendo,* as the court below did (R. 40–41), petitioners' major premise that an individual may take an impression of his own mouth, it does not follow, as petitioners argue, that he may also engage another layman to perform dental services for him. Indeed, the very purpose of the state laws regulating the practice

of medicine and dentistry is to protect the individual from ignorance, incapacity and imposition on the part of those persons who engage in activities relating to the public health. That the states may do so is not open to question. *Semler* v. *Dental Examiners,* 294 U. S. 608. The situation in this respect is analogous to the inability of a layman to secure harmful drugs for medicinal purpose without prescription of a licensed physician, even though the individual may have diagnosed his own ailment. It follows, as petitioners suggest (Pet. 11), that they will be denied the right to engage in the business of constructing and selling "mail-order" dentures. But since we think it clear that the statutes involved are a reasonable exercise of the protective powers of the state and federal government, petitioners are deprived of no constitutional rights.

(b) Petitioners also urge (Pet. 12–13) in respect of the states' dentistry laws the same argument which they advance against the Federal Denture Act, i. e., that by permitting the construction of dentures only upon the prescription of a dentist, the states have delegated legislative power to licensed dentists without setting out guiding standards for the exercise of that power. Passing the point that delegation of power by a state is not forbidden by the Federal Constitution (*Highland Farms Dairy, Inc.* v. *Agnew,* 300 U. S. 608), and treating the objection as in substance one of due process, we submit that it is unsubstantial.

The states have licensed dentists and have authorized them in their practice of dentistry to procure the construction of dentures. Implicit in the requirement that a denture may be constructed only upon the order or prescription of a dentist is the fact that the dentist will, upon examination of his patient, determine the data necessary to the construction of a denture for that person and that the denture will then be constructed pursuant to the specifications of the dentist. None of the decisions upon which petitioners rely (Pet. 12–13) supports the conclusion that this constitutes an unlawful exercise of legislative power.

CONCLUSION

None of the contentions which petitioners have advanced casts any serious doubt upon the constitutionality of the Federal Denture Act or the state laws which it implements. The propriety of the convictions in all other respects is undisputed. Accordingly, we respectfully submit that the petition for a writ of certiorari should be denied.

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APPENDIX

The Federal Denture Act, "An Act to protect the public health by the prevention of certain practices leading to dental disorders; and to prevent the circumvention of certain State or Territorial laws regulating the practice of dentistry," approved December 24, 1942, c. 823, 56 Stat. 1087; 18 U. S. C., Supp. IV, 420f, 420g, and 420h, provides:

> SEC. 1. That it shall be unlawful, in the course of the conduct of a business of constructing or supplying dentures from casts or impressions sent through the mails or in interstate commerce, to use the mails or any instrumentality of interstate commerce for the purpose of sending or bringing into any State or Territory the laws of which prohibit—
>
> (1) the taking of impressions or casts of the human mouth or teeth by a person not licensed under the laws of such State or Territory to practice dentistry;
>
> (2) the construction or supply of dentures by a person other than, or without the authorization or prescription of, a person licensed under the laws of such State or Territory to practice dentistry; or,
>
> (3) the construction or supply of dentures from impressions or casts made by a person not licensed under the laws of such State or Territory to practice dentistry, any denture constructed from any cast or impression made by any person other than, or without the authorization or prescription of, a person licensed under the laws of the State or Territory into which such

denture is sent or brought to practice dentistry.

SEC. 2. As used in this Act, the term—

(1) "Denture" means a set of artificial teeth, or any prosthetic dental appliance;

(2) "Territory" means any Territory or possession of the United States, including the District of Columbia and the Canal Zone.

(3) "Interstate commerce" means (1) commerce between any State or Territory and any place outside thereof, and (2) commerce within the District of Columbia or within any other Territory not organized with a legislative body.

SEC. 3. Any violation of any provision of this Act shall be punished by a fine of not more than $1,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

The laws of Indiana regulating the practice of dentistry (Sections 63–501 et seq., Burns, Indiana Statutes, 1933) provide, in part:

SEC. 63–501. It shall hereafter be unlawful for any person to practice dentistry in Indiana who has not first obtained a license so to do as hereinafter provided.

SEC. 63–522. Any person shall be said to be practicing dentistry within the meaning of this act who * * * makes impressions or casts of any oral tissues or structures for the purpose of diagnosis or treatment thereof or for the construction, repair, reproduction or duplication of any prosthetic device to alleviate or cure any oral lesion or replace any lost oral structure, tissue, or teeth; or engages in practices included in the curricula of recognized dental colleges; or directly or indirectly by any means or methods furnishes, supplies, constructs, re-

> produces, repairs, or adjusts any prosthetic denture, bridge, appliance, or any other structure to be worn in the human mouth and delivers the same to any person other than the duly licensed dentist upon whose prescription or order the work was performed; * * *

Section 152.02 of the Wisconsin Statutes, 1943, provides:

> SEC. 152.02 (1). One who was engaged in the lawful practice of dentistry in this state on January 1, 1939, may continue if he has annually registered. No other person shall practice dentistry in this state, unless he is licensed and annually registered in the state of Wisconsin. Any person shall be said to be practicing dentistry within the meaning of this chapter who * * * except on written prescription of a licensed dentist, and by use of impressions taken by a duly licensed and practicing dentist, shall directly or indirectly by mail, carrier, person or any other method furnish, supply, construct, reproduce or repair prosthetic dentures, bridges, appliances or other structures to be used or worn as substitutes for natural human teeth; * * * or who engages in any of the practices included in the curricula of recognized dental schools or colleges. * * *

The pertinent provisions of the Michigan Statutes (annotated, 1944 Supp.) are:

> SEC. 14.629(4) Except as herein otherwise provided, it shall be unlawful for any person to practice or engage in the practice of dentistry or dental surgery in any of its branches, other than:
>
> 1. Those who are duly registered and licensed dentists in this state under the pro-

visions of either Act No. 235 of the Public Acts of 1933, or the laws of this state in force at the time of their license and registration; and

2. Those duly licensed and registered under the provisions of this act.

SEC. 14.629(12) A person practices dentistry, within the meaning of this act, when it shall be shown:

* * * * *

8. That he takes impressions of the human tooth, teeth, jaws, or performs any phase of any operation incident to the replacement of a part of a tooth, teeth or associated tissues; or

* * * * *

10. That he performs any operation included in the curricula of recognized dental schools or colleges.

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IN THE

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OCTOBER TERM, A. D. 1945

No. 124

MARGARET M. JOHNSON AND MARY E. LAYTON, DOING BUSINESS AS UNITED STATES DENTAL COMPANY, AND VOYLE CLARK JOHNSON,
Petitioners,

VS.

THE UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Petitioners desire to correct certain assertions made by the respondent in its brief in opposition to the granting of certiorari in this case. Respondent erroneously states (Resp. Br. p. 4) that petitioners do not controvert that their practice of constructing dentures from self-taken impressions would be unlawful if practiced in Indiana. Quite the contrary. Petitioners have consistently maintained that the dentistry laws of Indiana (and of all the other states) do not prevent petitioners from constructing dentures from self-taken impressions; and moreover, that if said state laws should be construed to so interfere with petitioners' practices, such interpretation

would render unconstitutional such provisions of the state dentistry laws. Respondent has been fully apprised of petitioners' position, both in petitioners' briefs in the Circuit Court of Appeals (pp. 18-24, 25-36) and in their original brief in support of petition for certiorari (pp. 9-11). At all times petitioners have maintained that they have been acting within the law, both state and federal.

Petitioners also controvert respondent's assertion (Resp. Br. p. 7) that the question of interpretation of the Federal Denture Act "is not presented by this case"; the interpretation of this statute is the crux of the instant case. Certainly petitioners have a right to challenge the interpretation of a federal law when a criminal indictment founded upon said statute is brought against them, particularly when the exact meaning of said statute admittedly is not clear even to the prosecuting officials. Petitioners are before this Court to exercise that right.

It is very material whether the phrase in the prohibitory clause of the federal statute—"without the authority or prescription of" relates to the word "impressions" or to the verb "constructed." If it relates to "impressions" the law would prohibit the making of impressions by laymen—except that such prohibition contains the implied exception that a person may take an impression of his own mouth or teeth and make a denture therefrom. Nor could any law constitutionally deny to a person his right to take such impressions. The Circuit Court of Appeals in its opinion admitted that the Federal Denture Act does not prohibit self-taken impressions. Under such interpretation, petitioners have not violated the Federal Denture Act, since they worked with self-taken impressions only. The conclusion is therefore inevitable that petitioners have not violated the Federal Denture Act, if the phrase "without the authority or prescription of" relates to the word "impressions."

It is possible, as respondent contends, that the phrase in question relates back to the verb "constructed" so as to require the authorization or prescription of a dentist for the "construction" of a denture, even from a legally taken impression. The existence of such two diametrically opposed reasonable interpretations of the core of the statute renders said statute so ambiguous that no criminal indictment should be sustained under it. The authorities are clear that a criminal statute, to be valid, must be certain and definite. See *State* v. *Van Keegan,* 42 Atl. (2d) 352, 354, and other authorities cited in the brief in support of the petition for certiorari.

CONCLUSION.

Petitioners respectfully submit that this is a proper case for review by this Court. Respondent's brief reveals the ambiguities in the Federal Denture Act; the constitutionality thereof should be settled in this, the first case to challenge its substantive provisions. *We submit that the petition for certiorari should be granted.*

Respectfully submitted,

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